BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	WT Docket 96-6
to Permit Flexible Service Offerings	)	
in the Commercial Mobile Radio Services	)	

REPLY COMMENTS OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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The Cellular Telecommunications Industry Association ("CTIA")[1], hereby submits its Reply Comments in the above-captioned proceeding.[2]

I. INTRODUCTION AND SUMMARY

The Commission's proposal to liberalize the use of CMRS spectrum to include the provision of fixed services continues its commitment to favor marketplace-based solutions over regulatory oversight to govern CMRS development. As stated in our Comments, CTIA fully supports Commission removal of all restrictions on use to the extent permitted by law. Moreover, the Commission has the requisite authority under both Section 332[3] and Section 253 as

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[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers, including cellular, personal communications services ("PCS"), enhanced specialized mobile radio, and mobile satellite services.

[2] Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, Notice of Proposed Rulemaking in WT Docket 96-6, FCC 96-17 (released January 25, 1996) ("Flexible Use Notice" or "Notice").

[3] 47 U.S.C. § 332.

added by the Telecommunications Act of 1996 ("1996 "Act")[4] to preempt state regulation of fixed services offered by CMRS providers.

CTIA's Reply Comments address those commenters, primarily state regulatory commissions and their trade associations, as well as local exchange carriers ("LECs"), that want to unnecessarily restrict and burden CMRS provision of fixed services.

As an initial matter, the primary issue raised by these commenters is not whether CMRS carriers should be permitted to provide fixed applications under their CMRS licenses. Rather, at issue is how such CMRS offerings should be regulated: (1) using the wireline model of dual federal/state regulation; or (2) the streamlined Section 332 model.

The recurring theme raised by the opposition rests upon a fundamental misinterpretation of the notion of regulatory parity as it has come to be employed in recent years. That is, commenters variously claim that because the provision of fixed services by a CMRS carrier will likely be functionally equivalent to LEC provision of wireline local exchange service, as a matter of policy and law: (1) CMRS provision of fixed local exchange service is subject to the same federal and state oversight currently accorded to wireline LECs; or, in the alternative, (2) CMRS carriers must wait until similar regulatory restrictions are removed from their wireline counterparts before providing fixed

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[4] 47 U.S.C. § 253(a) (removal of state entry barriers).

local loop service.[5] According to these commenters, such a "technology neutral" approach is required because the Commission is obligated to promote regulatory parity among similar services.

These interpretations completely confuse the notion of regulatory parity. In enacting legislation designed to reform the CMRS market in 1993, and more recently with the passage of the 1996 Act, Congress recognized that the presence of competition, and the corresponding absence of substantial, persistent market power, is the determining factor in the level of regulatory oversight necessary. In essence, in this context regulatory parity commands that the government refrain from imposing differential costs and limitations on firms that are "similarly-situated." Firms are inherently not "similarly-situated" if they possess differing levels of market power; therefore, disparate regulatory treatment applied to monopolist firms vis-a-vis competitive firms is fully justified, as necessary to protect the public interest.[6] No commenter can credibly assert that Congress failed to recognize this market power distinction. And it is precisely this distinction which makes the difference.

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[5] It is unclear whether these commenters limit the application of their proposals to CMRS provision of fixed local exchange service or would apply them more generally to all fixed applications.

[6] In this regard, CTIA fully supports the removal of any and all unnecessary and burdensome regulations, whether federal or state. Further forbearance for the CMRS market, though, should not be delayed merely because other markets have yet to achieve reform.

II. NOTWITHSTANDING COMMENTER RECOMMENDATIONS IN FAVOR OF A "TECHNOLOGY NEUTRAL" REGULATORY PARITY POLICY, THE COMMISSION SHOULD QUICKLY ADOPT ITS CMRS FLEXIBLE USE PROPOSAL.

As explained in our initial Comments, Congress granted the Commission sufficient latitude to define "mobile services" such that it may include within the definition the provision of fixed services.[7] Because the "mobile services" definition is sufficiently fluid, the state rate and entry preemption provisions of Section 332 apply to preempt state regulation of CMRS carrier fixed services offerings. Moreover, even if fixed services cannot be considered "mobile" for these purposes, the 1996 Act supplies the Commission with the authority to preempt

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[7] See CTIA Comments at 7-12. In brief, we explained that Congress granted the Commission express authority to classify which services should be considered "personal mobile services," as well as to establish alternative definitions of "mobile services" in successor proceedings. See 47 U.S.C. § 153(14). Moreover, Congress in its deliberations specifically contemplated that "mobile services" may comprehend fixed applications as well. In addition, and as explained below, Congress specifically approved CMRS provision of basic telephone service in competition with LECs, and with a minimum of state regulatory oversight.

While several commenters take issue with the notion that "mobile services" can include fixed applications, see, e.g., Bell Atlantic Comments at note 5 (mere assertion that fixed applications are facially inconsistent with the "mobile services" definition); The New York State Department of Public Service ("NYDPS") Comments at 1-2 (claims that the Commission has never considered primarily fixed applications such as BETRS as mobile services; does not, however, assess congressional intent in revising Section 332), they provide no convincing rebuttal of CTIA's prior detailed assessment. Moreover, it appears that NYNEX agrees in principle with CTIA's assessment that the Commission has substantial discretion to define "mobile services." See NYNEX Comments at 9 ("As a technical matter, it could be argued that PCS service is 'CMRS' irrespective of whether it is fixed or not, if the Commission says so.") (citation omitted).

state and/or local regulations which "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[8] Thus, the Commission has more than sufficient latitude to adopt its flexible use proposal and preempt contrary state regulation.

In response to the Commission's proposals, several commenters claim that the Commission's adoption of flexible use for CMRS must be expressly conditioned upon pervasive federal and state regulation of such fixed applications. The primary reason advanced in favor of government oversight is the need for the Commission to preserve "technology neutral" regulatory solutions.[9] As described by The National Association of Regulatory Utility Commissioners ("NARUC"):

> Currently, State regulation of CMRS and wireline services differs significantly. Thus, if upheld on appeal, the [flexible use] NPRM proposal has the undesirable impact of favoring a particular technology for local access. While NARUC supports the efficient use of technology in the provision of local exchange service, we oppose Federal policy that is not technology neutral and has the impact of favoring deployment of one technology over another.[10]

In other words, if the Commission pursues a regulatory agenda which establishes differing regulatory regimes for providers of local exchange services based upon the technology

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[8] 47 U.S.C. § 253(a). See CTIA Comments at 14-15.

[9] See, e.g., NYDPS Comments at 3; BellSouth Corporation Comments at 3; Bell Atlantic Comments at 3; Pacific Telesis Group Comments at 2; NYNEX Comments at 3, 8 (applicable if the primary use of CMRS spectrum is for fixed local loop) (citation omitted); OPASTCO Comments at 2; LDDS WorldCom Comments at 8 (long distance carrier).

[10] NARUC Comments at 4.

used, the resulting disparity is detrimental to overall competition. To this end, Ameritech argues:

> . . . To favor one specific technology over another by awarding an arbitrary regulatory advantage would subvert the natural operation of marketplace forces, and lead to inefficient deployment of network technologies, just as surely as favoring one wireless service over another would skew competition among CMRS providers offering equivalent services.[11]

At least one commenter expresses a variant on this theme, i.e., uneconomic restrictions on a LEC's ability to price services competitively must be removed prior to any proposed amendment to CMRS rules to allow flexible use.[12]

A "technology neutral" approach is appealing only on a strictly superficial level. Upon examination, it is directly contrary to congressional mandate, and with good reason because of its profoundly negative effect on consumer welfare.[13] The

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[11] Ameritech Comments at 4.

[12] See GTE Comments at 1-8.

[13] Because of the dynamic nature of CMRS, permitting greater flexibility for PCS and not cellular or SMR could effectively deter their development and evolution. These kinds of efficiency-reducing regulatory actions are specifically among those that Congress disfavored. Thus, the Commission should reject the proposals to limit flexible use, see, e.g., PCS, One, Inc. Comments at 2; Omnipoint Corporation Comments at 1-10, in favor of extending the right to flexible spectrum use to all CMRS carriers.

Such action, unlike that advanced by the "technology neutral" advocates, is fully consistent with Section 332. Congress specifically amended Section 332 in 1993 to ensure that "services that provide equivalent mobile services are regulated in the same manner." H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 259 (1993) ("House Report"). For this reason, Congress established "uniform rules" to govern CMRS offerings and directed the Commission "to review its rules and regulations to achieve

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ultimate goal of government regulators in this era of transition from local exchange monopoly to competition should be to remove all unnecessary restrictions imposed upon telecommunications carriers. Restrictions become unnecessary and burdensome principally if and when there is sufficient competition such that detailed government oversight is unwarranted.

With the co-existence of competition and entrenched market power in the telecommunications industry, differential regulation is a necessary outcome. Importantly, the marketplace will not benefit from regulatory policies which artificially encumber some participants with needless regulation in the interests of promoting technology neutral solutions. That approach to regulatory parity was rejected many decades ago. This kind of all-or-nothing regulation -- in essence, government handicapping -- where forbearance is awarded only when the entire market is sufficiently competitive, will not serve the ultimate goal of competition and consumer welfare. Rather, the solution is to identify and then expeditiously remove unnecessary restrictions for all providers lacking market power.

A. Section 332, As Revised in 1993, Reflects Congress' Directive to Remove and to Refrain From Imposing Unnecessary, Burdensome Regulation for Competitive Firms.

In amending Section 332 in 1993, Congress established "uniform rules" to govern all commercial mobile service offerings

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[13](...continued)
regulatory parity among services that are substantially similar." Id.

"to ensure that all carriers providing such services are treated as common carriers under the Communications Act of 1934."[14] It specifically determined, however, that it was only necessary to preserve the "key principles" of common carriage such as "nondiscrimination," and to permit "minimal state regulation."[15] It permitted the Commission "authority to specify by rule which provisions of title II may not apply,"[16] and it preempted state rate and entry regulation of CMRS to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[17]

In essence, by its revision, Congress explicitly recognized that the Commission's prior regulatory efforts (in the absence of

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[14] See House Report at 259. See also H.R. Conf. Rep. No. 213, 103rd Cong., 1st Sess. 490 (1993) (the intent of Section 332(c)(1)(A) "is to establish a Federal regulatory framework to govern the offering of all commercial mobile services"). ("Conference Report").

[15] See 139 Cong. Rec. H3287 (daily ed. May 27, 1993) (statement of Rep. Markey).

[16] House Report at 260.

[17] Id. The common carrier provisions of Title II of the Act generally reflect a dual regulatory scheme with respect to telecommunications services, i.e., the Commission retains jurisdiction over interstate matters while intrastate regulation resides with the states. Specifically, Section 1, 47 U.S.C. § 151, grants the Commission jurisdiction over interstate telecommunications matters. The Communications Act specifically reserves to the states "jurisdiction with respect to . . . charges, classifications, practices, services, facilities [and] regulations for or in connection with intrastate communication service." 47 U.S.C. § 152(b). However, with respect to mobile services, state jurisdiction is explicitly limited by Section 332. See 47 U.S.C. § 332(c)(3)(A) (express preemption of state regulation of entry of and rates charged by CMRS providers).

statutory reform) to address the increasing competitive nature of mobile services by labelling emerging mobile services carriers as "private" was creating harmful disparity. In fact, under the law existing at that time, Congress found that private carriers were:

> permitted to offer what are essentially common carrier services . . . while retaining private carrier status. Functionally, these 'private' carriers [became] indistinguishable from common carriers but private land mobile carriers and common carriers [were] subject to inconsistent regulatory schemes [i.e., common carriers were subject to Title II plus state regulation and private carriers were subject to essentially no regulation].[18]

In direct response to this inherent and unintended disparity, Congress revised Section 332 to permit federal forbearance and to require state preemption so that "the disparities in the current regulatory scheme [do not] impede the continued growth and development of commercial mobile services and deny consumers the protections they need."[19]

Of course, the very disparities referred to by Congress were ones in which providers of substantially similar services, who were also similarly situated (i.e., lacking substantial market power) were subject to differing regulatory regimes. In specific recognition and affirmation of the Commission's previous (and necessarily piecemeal) efforts to remove these burdens, Congress introduced regulatory reform into the CMRS market to make explicit the Commission's implicit intentions.

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[18] House Report at 259-260 (citation omitted).

[19] Id. at 260.

In fact, and directly contrary to some commenters' assertions in this proceeding, Congress specifically authorized and required disparate federal and state regulatory treatment of wireless vis-a-vis wireline local exchange service. This is the very reason why it permitted the Commission to forbear from all but Sections 201, 202 and 208 of Title II for CMRS, and the very reason why it preempted state rate and entry regulation, even in those cases where the CMRS carrier was providing functionally equivalent local exchange services in competition with the wireline incumbent.[20]

Specifically, in commenting upon the states' residual authority to regulate CMRS providers for universal service concerns, Congress noted that:

> Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a

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[20] Moreover, Congress required the Commission to regularly assess "competitive market conditions" of CMRS and to rely upon such assessment to determine whether to forbear from Title II obligations. In addition, Congress authorized the Commission to differentially regulate CMRS carriers, to the extent that certain classes of CMRS carriers were more competitive than others. See 47 U.S.C. § 332(c)(1)(C); Conference Report at 491 (the purpose of Section 332(c)(1)(C) "is to recognize that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services"). Thus, there was an explicit recognition on the part of Congress that differential regulation, even of CMRS (in which Congress was expressly trying to remove regulatory disparity), was justified as a means to promote competition and safeguard consumers from the improper exercise of market power.

Of course, upon examination of the CMRS market, the Commission found it sufficiently competitive to extend forbearance from most Title II obligations to all CMRS carriers alike. See Regulatory Treatment of Mobile Services, Second Report and Order in GN Docket 93-252, 9 FCC Rcd 1411 (1994).

> substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.[21]

As the Conference Report clarifies:

> the Conferees intend that the Commission should permit States to regulate radio service provided for basic telephone service **if subscribers have no alternative means of obtaining basic telephone service.** If, however, several companies offer radio service **as a means of providing basic telephone service** in competition with each other, such that consumers can choose among alternative providers of this service, **it is not the intention of the conferees that States should be permitted to regulate these competitive services simply because they employ radio as a transmission means.**[22]

These passages are meaningful on several counts. First, Congress specifically recognized and approved wireless carriers providing "basic telephone service" in competition with wireline carriers. It revised Section 332 specifically to delineate the states' role under those circumstances.

Second, Congress deliberately and severely limited the application of state authority in regulating CMRS provision of basic telephone service. In fact, Congress only reserved the states' authority to regulate the rates charged by CMRS for basic telephone service if the wireless carrier was the sole local exchange services provider in the relevant geographic market. Importantly, if there were more than one provider of basic

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[21] 47 U.S.C. § 332(c)(3)(A).

[22] Conference Report at 493 (emphasis added).

telephone service, state rate regulation of the CMRS provider was not implicated at all.[23]

Third, Congress specifically limited the scope of state rate regulation under these circumstances to universal service concerns. In other words, even if the CMRS carrier were the sole provider of basic telephone service in a given market, this did not automatically trigger the wholesale reimposition of state oversight and rate regulation. That is, state retention of rate regulation was narrowly circumscribed to protect universal service considerations and nothing more.

Fourth, the fact that wireless carriers used a different technology, i.e. radio, to provide essentially the same basic telephone service as their wireline counterparts, did not implicate the retention of state jurisdiction. In fact, as far as Congress was concerned, this was the proper and intended outcome of its regulatory reform efforts. And that is because Congress held key the relevant underlying market power of the respective parties, and not the underlying technologies they employed to provide such services in competition with each other.

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[23] Thus, contrary to Bell Atlantic's assertions, Bell Atlantic comments at 4, the mere fact that a CMRS carrier is a substitute for the landline LEC does not automatically trigger state rate regulation. Instead, the CMRS carrier must be the sole provider of local exchange service; moreover and as explained below, state rate regulation, to the extent required, is limited to universal service concerns.

B. The 1996 Act, As Well, Reflects Congress' Directive to Remove and to Refrain From Imposing Unnecessary, Burdensome Regulation for Competitive Firms.

The most cursory examination of the 1996 Act reveals Congress' intent to maintain the policies reflected in Section 332. Specifically, the interconnection and unbundling provisions of Section 251[24] recognize three distinct levels of obligations or duties to be imposed upon various telecommunications providers, entirely dependent upon their level of market power.

The general duties to interconnect (either directly or indirectly) with other telecommunications carriers and to maintain a minimum level of network compatibility[25] applies to almost all providers of telecommunications services, including LECs, incumbent LECs and CMRS providers.[26] In turn, local exchange carriers, of which CMRS providers are specifically excluded, have the additional obligations to provide resale, number portability, dialing parity, access to rights-of- way and reciprocal termination.[27] Finally, incumbent local exchange carriers have additional obligations to provide, among other

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[24] 47 U.S.C. § 251.

[25] Id. at § 251(a).

[26] 47 U.S.C. § 153(49) (expansive definition of telecommunications carrier).

[27] 47 U.S.C. § 251(b)(1)-(5). The 1996 Act defines a local exchange carrier as "any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term." 47 U.S.C. § 153(44).

things, direct interconnection, unbundled access, resale at wholesale rates, and physical collocation.[28]

It is no accident that the duties and obligations imposed upon all carriers in the interconnection provision correspondingly increase with their level of market power. Congress specifically passed the 1996 Act as a means to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications

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[28] 47 U.S.C. § 251(c)(1)-(6). The Commission should reject the proposal by COMAV, LLC and The Telmarc Group, Inc. to require CMRS carriers to unbundle their network and otherwise treat CMRS providers as LECs under the 1996. See COMAV, LLC and The Telmarc Group, Inc. Comments at 11, 26. Because CMRS carriers cannot exercise market power in any given telecommunications market, there is no public interest need to impose such burdensome requirements.

Moreover, the Commission should similarly reject Celpage, Inc.'s proposal that CMRS carriers be "required to provide interconnection upon reasonable request to CMRS carriers providing fixed service offerings, pursuant to Section 201(a) of the Act." See Celpage, Inc. Comments at 8. As CTIA has long advocated, see, e.g., CTIA Comments in GN Docket 93-252, at 41-42 (November 8, 1993); CTIA Reply Comments in GN Docket 93-252, at 21-22 (November 23, 1993); CTIA Comments in CC Docket 94-54, at 25-34 (September 12, 1994); CTIA Reply Comments in CC Docket 94-54, at 12-15 (October 13, 1994); CTIA Comments in CC Docket 94-54, at 3-15 (June 14, 1995); CTIA Reply Comments in CC Docket 94-54, at 3-7 (July 14, 1995), only carriers with substantial, persistent market power should be subject to direct interconnection under Section 201, 47 U.S.C. § 201. Because of the competitive nature of CMRS, the market is fully capable of determining when direct interconnection is efficient, and therefore desirable. This interpretation is also entirely consistent with the 1996 Act. See 47 U.S.C. § 251(a), (c) (telecommunications providers have a duty to interconnect with each other, but they can do so indirectly via the LEC; only incumbent LECs must provide direct interconnection to their network).

markets to competition."[29] It recognized that some markets, and some carriers in those markets, would need closer regulatory supervision as the transition to workable competition was made. Therefore, it intentionally created a system of differential regulation based upon the ability to exercise market power. Thus, Commission policy to subject CMRS provision of fixed services to the streamlined Section 332 process is entirely consistent with Congressional directive.

One final note: the suggestion of the National Telephone Cooperative Association ("NTCA") to subject CMRS carriers who provide both mobile and local loop service to "provisions that require the states and the [C]ommission to establish cost allocation rules, accounting safeguards, and guidelines," to protect against improper cross-subsidization[30] provides a graphic illustration why the Commission is well-advised to adopt the regulatory regime for CMRS provision of fixed service proposed in the Notice. NTCA's analysis, of course, fails to factor at all that CMRS carriers lack market power in any given market (a necessary prerequisite to improper cross-subsidization). Of course, this very lack of market power is why the Commission forbore from most Title II obligations and why it has preempted state petitions to continue CMRS rate regulation.

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[29] S. Conf. Rep. No. 230, 104th Cong., 2d Sess, at 1 (1996).

[30] NTCA Comments at 5 (NTCA's comments made in the context of universal service reform).

To subject CMRS carriers to such obligations, as a means to ultimately permit them the flexibility to compete with the local exchange, serves no one, least of all consumers.

III. CONCLUSION

CTIA respectfully requests that the Commission adopt rules authorizing all CMRS providers to provide fixed services consistent with the proposals contained herein and in its initial Comments.

Respectfully submitted,

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